

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:LM:MCT:DET:TL-N-4726-00
ERSkinner

date:

to: Mike Lefevre, LMSB Team Leader
Attn: Wes Bulik, Revenue Agent

from: LMSB Division Counsel, Detroit, Michigan

subject: **Restricted Consents**

This memorandum is in response to your request for advice regarding our office's review of proposed language for a restricted consent to extend the statute of limitations for assessment. The advice in this memorandum is subject to post-review in the National Office, which we will expedite. If you have any questions, please call the undersigned at (313) 237-6426.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issue

Whether the attached Form 872, Consent to Extend Time to Assess Tax, and the restrictive language contained therein, is sufficient to extend the statute of limitations for assessment with respect to the three issues for which the LMSB audit team will propose adjustments.

Conclusion

The attached Form 872, Consent to Extend Time to Assess Tax, and the restrictive language contained therein, is sufficient to extend the statute of limitations for assessment with respect to the three issues for which the LMSB audit team will propose adjustments.

Facts

The Large and Mid-Size Business Division (LMSB) is conducting an income tax examination of [REDACTED] (formerly known as [REDACTED]) (" [REDACTED] ") for the year ended March 31, [REDACTED]. [REDACTED] (" [REDACTED] ") merged with [REDACTED] in [REDACTED]. As a result of the merger, [REDACTED] became a subsidiary of [REDACTED].¹ [REDACTED] was audited for years prior to the merger with [REDACTED] and a number of adjustments were proposed by the Service for [REDACTED]'s [REDACTED] through [REDACTED] tax years. A number of the adjustments were "roll-over" type adjustments affecting subsequent years' tax liability. [REDACTED] has not amended its FYE [REDACTED] U.S. Corporate Income Tax Return to reflect the roll-over adjustments from [REDACTED]. The statute of limitations for assessments relating to [REDACTED]'s FYE [REDACTED] U.S. Corporate Income Tax Return will expire on [REDACTED].

The [REDACTED] roll-over adjustments which affect [REDACTED]'s FYE [REDACTED] return have been discussed with [REDACTED]'s representative. The Service was informed [REDACTED] would not be filing an amended FYE [REDACTED] tax return to reflect the roll-over adjustments and the Service could propose the adjustments by issuing a notice of deficiency. [REDACTED]'s representative indicated [REDACTED] would execute a consent to extend the period of limitations for FYE [REDACTED] but such consent would be limited to the roll-over adjustments.

¹The roll-over adjustments affect the tax return of [REDACTED] for FYE March 31, [REDACTED]. Page one of that return is attached hereto as Att. A.

The revenue agent assigned to the audit of [REDACTED] for FYE [REDACTED] indicates the roll-over adjustments to [REDACTED]'s FYE [REDACTED] return which flow from the prior years' audit of [REDACTED] (and for which the Service would propose adjustments) relate to the following:

1. **Depreciation related to the acquisition of assets financed with Tax Exempt Revenue Bonds by [REDACTED] during [REDACTED]:**
During [REDACTED], [REDACTED] was a wholly owned subsidiary of [REDACTED]. [REDACTED] was a wholly owned subsidiary of [REDACTED] during [REDACTED]. I.R.C. § 168(g)(2) states that tax-exempt bond financed property should be depreciated under the Alternative Depreciation System. Since [REDACTED] depreciated its tax-exempt bond financed assets using the Modified Accelerated Cost Recovery System, the Service proposed an adjustment correcting the depreciation method which has a roll-over effect on [REDACTED]'s FYE [REDACTED] income tax return;
2. **Net operating loss deduction:** [REDACTED] incurred net operating loss deductions for the years ended [REDACTED] and [REDACTED] ([REDACTED] was the year of the merger with [REDACTED] and [REDACTED] filed a short year return for [REDACTED]). Adjustments determined by the Service relative to the net operating loss deductions have a roll-over effect on [REDACTED]'s FYE [REDACTED] income tax return; and
3. **Accrued wages and payroll taxes for unpaid wages:** [REDACTED] claimed deductions for accrued wages and payroll taxes for unpaid wages which the Service adjusted for [REDACTED] and [REDACTED]. Those adjustments also have roll-over effects on [REDACTED]'s FYE [REDACTED] income tax return.

The above adjustments are the only adjustments the audit team will propose for [REDACTED]'s FYE [REDACTED] return.

Discussion and Analysis

Internal Revenue Code Section 6501(a) generally provides that a tax must be assessed within 3 years after a return is filed. However, it is often necessary to request extensions of the period of limitations in tax cases to provide adequate time for consideration of disputed issues.

Internal Revenue Code Section 6501(c)(4) provides that where the Secretary and the taxpayer have consented in writing to the assessment of tax after the time prescribed in I.R.C. Sec. 6501, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Forms 872 and 872-A may be used for this purpose.

A consent may be limited as to coverage. The Service has ruled a consent to extend the period of limitation may be restricted to one or more issues where such issues cannot be resolved within the normal limitation period, or prior extensions thereof because of the need to await establishment of an interpretative position through court decision, regulation, ruling or other National Office action. (Rev. Proc. 68-31, 1968-2 C.B. 917 as modified by Rev. Proc. 77-6, 1977-1 C.B. 539).

Internal Revenue Manual Sections 22.8 et. seq. (Rev. 01-01-2000) provide in part that:

As a general rule, the Service will enter into a restricted consent requested by the taxpayer if all of the following conditions exist:

- a. The number of unresolved issues required to be covered by the restricted consent do not make it impractical to do so;
- b. The scope of the restrictions must be clearly and accurately described for all of the unresolved issues;
- c. The issues not covered by the restricted consent are agreed and provision is made for assessing any deficiency or, under certain situations, scheduling any overassessment (refund or credit) for the agreed issues;
- d. The use of the restricted consent at the district level is approved by the group manager.
- e. The language in the restricted consent is approved by District Counsel.²

Based on the information provided to our office, it appears the three issues for which adjustments will be proposed can be clearly and accurately described in restricted consents to extend the statute of limitations for assessments related to those issues.

A Form 872, Consent to Extend the Time to Assess Tax is essentially a unilateral waiver of a defense by the taxpayer and not a contract. Strange v. United States, 282 U.S. 270 (1931); United States v. Gayne, 137 F.2d 522 (2d Cir. 1943); and Tallal v. Commissioner, 77 T.C. 1291 (1981). However, since I.R.C. Sec. 6501(c)(4) requires the parties to reach a written agreement, courts have applied contract

² This IRM section has not been modified to reflect the fact there is no longer a "district level" or "District Counsel" as a result of the IRS/Chief Counsel reorganization. However, in this case, the use of the restricted consent has been approved by the Team Manager, Mike Lefevre, and our office is reviewing the matter since [REDACTED] is an LMSB taxpayer.

principles to determine the existence of and scope of that agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988); Southern v. Commissioner, 87 T.C. 49 (1986); and Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). Thus, it is of paramount importance the restrictive language contemplated in the consent at issue accurately describes the areas of anticipated adjustment.

Basic Restrictive Statement

Internal Revenue Manual Sec. 22.8.11 (1)(c) requires that each restricted consent contain a basic restrictive statement and a description of the areas of consideration. The basic restrictive statement is: "The amount of any deficiency is to be limited to that resulting from any adjustment to (description of the areas of consideration) including any consequential changes to other items based on such adjustment." See I.R.M. Sec. 22.8.12. The basic restrictive statement should be included on each proposed restricted consent.

Alternative Minimum Tax

Revenue Procedure 68-31, 1968-2 C.B. 917, sets forth procedures under which the scope of consents extending the limitation period for assessment may be restricted to one or more issues ("restricted consents"). It provides that where resolution of the principal issues subject to the restricted consent have an automatic effect on other items, e.g., medical expenses, which must be changed upon an increase or decrease in income, the restricted consent will cover both the principal issues and the related or automatic items. Revenue Procedure 77-6, 1977-1 C.B. 539, modified Rev. Proc. 68-31 to provide that automatic effect means any direct or indirect effect on other items caused by an adjustment to the principal issue. Therefore, where resolution of the principal issues subject to the restricted consent has a direct or indirect effect on other items, the restricted consent will cover both the principal issues and the consequential changes to other items.

Internal Revenue Code Section 55(a) provides for the imposition of an alternative minimum tax on income in certain situations. The revenue agent has indicated the alternative minimum tax would not apply in this case. Thus, the proposed restricted consent need not contain alternative minimum tax as an area to be covered for possible deficiency assessment after the expiration of the statute of limitations .

We have reviewed the attached proposed restricted consent and concur that it adequately describes the three issues for which the audit team will propose adjustments for [REDACTED]'s FYE [REDACTED] return. The consent should be submitted for approval to [REDACTED] and processed in accordance with your usual procedures.

Should you have any questions or concerns regarding this matter, please contact the undersigned attorney at (313) 237-6426.

PHOEBE L. NEARING
Associate Area Counsel, LMSB

By:

ERIC R. SKINNER
Attorney